

STATE OF MICHIGAN
COURT OF APPEALS

BADGER MUTUAL INSURANCE COMPANY,

Plaintiff/Counter Defendant-
Appellant,

v

ROSS ENTERPRISES, INC.,

Defendant/Counter Plaintiff,

and

SUZANNE DIMILIA and MICHAEL
BRZEZINSKI, Co-Personal Representatives of the
Estate of KENNETH BRZEZINSKI,

Defendants-Appellees.

UNPUBLISHED

March 3, 2011

No. 294489

Wayne Circuit Court

LC No. 09-006218-CZ

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

This declaratory action arises from the death of Kenneth Brzezinski ("the decedent"), who was killed when his vehicle was struck by a vehicle driven by Ronnie Jackson. Defendants Suzanne DiMilia and Michael Brzezinski ("defendants"), as co-personal representatives of the decedent's estate, filed an underlying dramshop action against defendant Ross Enterprises, Inc. ("Ross"), the owner of a gentlemen's club that served Jackson alcoholic beverages shortly before the accident. Defendants later amended their complaint to add a claim against Ross for negligence based on Ross's actions in arranging for a taxicab for Jackson, but then furnishing Jackson with his car and car keys and allowing him to drive away. Plaintiff, Ross's insurer under a commercial liability policy, brought this declaratory action to determine whether it had a duty to defend and indemnify Ross under the policy. The parties filed cross-motions for summary disposition. The trial court denied plaintiff's motion and granted defendants' motion in part, holding that plaintiff had a duty to defend Ross in the underlying action, as well as a duty to

indemnify Ross up to the policy limits “to the extent the fact finder so determines negligence in Count II in the underlying action.” Plaintiff appeals as of right.¹ We reverse, because we conclude the trial court erred in its interpretation of the concurrent causes policy exclusion.

Initially, we reject defendants’ argument that plaintiff lacks standing to contest defendants’ ability to assert an independent negligence claim against Ross as a basis for precluding coverage under plaintiff’s policy. In *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 372; ___ NW2d ___ (2010), our Supreme Court recently reinstated the historical test for standing, stating:

We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan’s longstanding historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Pursuant to its insurance policy with Ross, plaintiff was providing a defense in defendants’ underlying action against Ross. Plaintiff was also potentially liable to indemnify Ross for any liability arising from Ross’s alleged negligence, up to the policy limits. Thus, plaintiff had a substantial interest in defendants’ underlying action against Ross, different from the citizenry at large, which gave rise to an actual controversy with respect to plaintiff’s duty to defend and indemnify Ross in the underlying action. Under MCR 2.605, plaintiff properly could bring this action to determine its rights and obligations under its policy. Further, plaintiff is an aggrieved party in light of the trial court’s ruling and, therefore, has standing to file this appeal. MCR 7.203(A); *Spires v Bergman*, 276 Mich App 432, 441-442; 741 NW2d 523 (2007).

We turn now to the issues presented in the summary disposition motions. This Court reviews a trial court’s summary disposition decision de novo. *Spiek v Dep’t of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court reviewed the parties’ cross-motions for summary disposition under MCR 2.116(C)(10), which tests the factual support for a claim. In reviewing a motion under this subrule, the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR

¹ After this appeal was filed, defendant Ross filed a petition for Chapter 11 bankruptcy. This Court thereafter closed the appeal with respect to defendant Ross, but allowed the appeal to continue with respect to defendants DiMilia and Brzezinski. *Badger Mut Ins Co v Ross Enterprises, Inc*, unpublished order of the Court of Appeals, entered April 19, 2010 (Docket No. 294489).

2.116(G)(5). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

The trial court found that defendants could proceed against Ross on both a common-law negligence claim and a dramshop claim. At the time of the incident in 2006, subsection (10) of the dramshop statute stated: “[t]his section provides the exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor.” MCL 436.1801(10) (2006).² In *Mann v Shusteric Enterprises, Inc.*, 470 Mich 320, 327-328 n 8; 683 NW2d 573 (2004), our Supreme Court recognized the following test to determine if the exclusive remedy provision of the dramshop act applies to bar a given claim:

(1) Does the claim against ‘the tavern owner’ arise out of an unlawful sale, giving away, or furnishing of intoxicants? If so, the dramshop act is the exclusive remedy.

(2) If the claim arises out of conduct other than selling, giving away, or furnishing of intoxicants, does the common law recognize a cause of action for the negligent conduct? If so, then the dramshop act neither abrogates nor controls the common-law action. If not, there is no independent common-law claim. [Internal quotation and citations omitted.]

See also *Madejski v Kotmar, Ltd.*, 246 Mich App 441, 445-448; 633 NW2d 429 (2001).

For the purposes of this appeal, we assume the trial court properly allowed defendants to assert a common-law negligence claim.³ The negligence claim was based on allegations that Ross, having notice that Jackson “had passed out in his own vomit at a table” in Ross’s club, called for a taxicab to take Jackson home because of his intoxicated condition, but that another employee of Ross then drove Jackson’s car to the front door of the club, gave Jackson his car keys, and allowed Jackson to drive away from the parking lot. We recognize that a defendant generally has no duty to protect a third party from an intoxicated person, or to prevent an intoxicated person from driving. See *Premo v Gen Motors Corp.*, 210 Mich App 121, 123-125; 533 NW2d 332 (1995), *Brown v Jones*, 200 Mich App 212, 215-216; 503 NW2d 735 (1993), *Reinert v Dolezel*, 147 Mich App 149, 156-157; 383 NW2d 148 (1985), and *McKnight v Carter*, 144 Mich App 623, 635; 376 NW2d 170 (1985). Unlike the foregoing cases, defendants’ underlying negligence claim here is based on Ross’s alleged negligence in furnishing Jackson with the means to drive in his intoxicated state.

² Our Legislature amended subsection (10) in 2008, adding the phrase, “to a minor or intoxicated person.” 2008 PA 11.

³ We make no determination whether plaintiff has a valid, independent, common law negligence claim. That issue is not before us and is not outcome determinative to the present case.

We conclude, however, that the trial court erred in finding that defendants' underlying negligence claim was covered by the general liability policy. The policy contained a concurrent causes exclusion, which stated:

EXCLUSIONS

We do not pay for a loss if one or more of the following excluded events apply to the loss, regardless of other causes or events that contribute to or aggravate the loss, whether such causes or events act to produce the loss before, at the same time as, or after the excluded event.

EXCLUSIONS THAT APPLY TO BODILY INJURY AND PROPERTY DAMAGE

* * *

7. **We** do not pay for **bodily injury** or **property damage** for which any **insured** may be held liable by reason of:

- a. causing or contributing to the intoxication of a person;
- b. the furnishing of alcoholic beverages to a person under the influence of alcohol or under the legal drinking age; or
- c. a law or regulation relating to the sale, gift, distribution, or use of alcoholic beverages.

This exclusion applies if **you are** in the business of manufacturing, distributing, selling, or serving alcoholic beverages.

Plaintiff argues that this exclusion (above) for concurrent causes precludes general liability coverage for Ross's alleged negligence. We agree.

When reviewing an exclusionary clause, courts will read the contract as a whole to effectuate the parties' overall intent. *Hayley v Allstate Ins Co*, 262 Mich App 571, 575; 686 NW2d 273 (2004). "Where the language is clear and unambiguous, the insurance policy must be enforced as written." *Id.* Here, the policy excludes indemnification for liability arising by reason of contribution to a person's intoxication, or by furnishing alcoholic beverages to a person under the influence of alcohol. More significantly for the case at bar, the exclusion operates whenever the excluded event applies to the loss, even if other events contribute to or aggravate the loss. The exclusion applies regardless of whether furnishing alcohol was the proximate cause of the damages, or was a more remote cause. Where, as here, the undisputed facts demonstrate that the liability resulted from the insured's sale of alcoholic beverages combined with another act or omission by the insured, the concurrent causes exclusion precludes coverage.

This result is consistent with this Court's decision in *Sunshine Motors, Inc v New Hampshire Ins Co*, 209 Mich App 58; 530 NW2d 120 (1995), in which the plaintiff's car dealership was flooded when the local drainage system was partially blocked by a piece of wood.

The defendant's policy excluded coverage for losses caused by flood, surface water, or water backing up from a sewer or drain. The policy also excluded coverage "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.* at 59. This Court determined that the plaintiff's losses resulted from a sequence of direct and indirect causes, and that the concurrent causes exclusion precluded coverage. The Court noted that the policy excluded coverage whether the blocked drainage system was the principal factor or a contributing factor in the loss. *Id.* at 60.

Defendants attempt to avoid the concurrent causes exclusion by arguing that the jury verdict does not indicate whether the provision of alcoholic beverages was a factor in the jury's allocation of fault. The record demonstrates, however, that defendants alleged the accident resulted from combined causes. In their amended complaint, defendants alleged that "[Ross], having voluntarily assumed the duty to provide Jackson with alternative transportation *due to his drunken condition*, was under a duty to act reasonably to ensure that Jackson was placed in the cab." (Emphasis added). The allegation indicates that Jackson's intoxication was at least an indirect or contributing factor in the resulting loss. Accordingly, the concurrent causes exclusion controls the coverage dispute.

Defendants further argue that the concurrent causes exclusion conflicts with the policy's liquor liability endorsement, and that as such the endorsement must supersede the exclusion. We disagree. By adding the liquor liability endorsement to the policy, the parties agreed to add coverage for losses arising out of the sale of alcoholic beverages, to a maximum of \$50,000 per occurrence. This additional coverage does not negate the concurrent causes exclusion. Rather, the liquor liability endorsement provides limited supplementary coverage of a specific risk in exchange for an additional premium. As explained in 3 Couch, Insurance, 3d § 129.32, pp 129-57—129-58:

Standard commercial general liability policies generally exclude bodily injury or property damage arising from the insured's manufacture, distribution, or sale of alcoholic beverages. Thus, claims based upon the insured's violation of state alcoholic beverages law, negligence in failing to ascertain minor driver's age, failure to warn driver of his or her intoxication and prevent him or her from driving while intoxicated, fall within the exclusion. By specifically excluding coverage for this risk generally, those who want such coverage must specifically request it and pay corresponding additional premiums, thereby allowing the insurer to assess the specific risks based on the nature and location of the business, as well as the general character and history of the insured.

Ross purchased a liquor liability endorsement in the amount of \$50,000 per occurrence. The endorsement required plaintiff to pay the endorsement policy limit for covered losses, but did not supersede the general policy with respect to any other coverage. The general policy remained in effect for coverage above \$50,000, and the concurrent causes exclusion precluded coverage of the loss at issue here.

Reversed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder